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July 27, 2006

William C. Vickrey
Administrative Director of the Courts
Judicial Council of California - Administrative Office of the Courts
455 Golden Gate Avenue
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RE: Judicial Council Authority To Adopt Rules For Judicial Education

Dear Mr. Vickrey:

You asked the Office of the Attorney General to provide informal legal advice regarding whether the Judicial Council of California is vested with authority to adopt rules for judicial education. For the reasons that follow, we conclude that the Judicial Council has legal authority to adopt rules for judicial education. We further conclude that if the rules for judicial education currently proposed by the Governing Committee of the Center for Judicial Education and Research (CJER)¹ are adopted by the Judicial Council, the rules would not be inconsistent with statute.

Turning first to the question of Judicial Council authority to adopt rules for judicial education, we begin our analysis by reviewing the express language of the California Constitution. Article VI of the California Constitution establishes the judicial branch of state government, and it sets forth the powers and duties of the various judicial branch entities and officers. The judicial power of the state is vested in the Supreme Court, the courts of appeal, and the superior courts. (Cal. Const., art. VI, § 1.) The constitution establishes the eligibility standards for judicial officers (Cal. Const., art. VI, § 15), and it also imposes certain restrictions on judges. (Cal. Const., art. VI, § 17.) The Supreme Court is responsible for making rules for the conduct of judges, both on and off the bench, and those rules are known as the Code of Judicial Ethics. (Cal. Const., art. VI, § 18, subd. (m).) In addition, the constitution provides that the Commission on Judicial Performance and the Supreme Court have specified authority and responsibility for judicial disciplinary proceedings. (Cal. Const., art. VI, §§ 8, 18.)

The California Constitution also establishes the Judicial Council. (Cal. Const., art. VI, §

1. CJER is a Judicial Council Advisory Committee comprised of appellate court justices, judges and others with expertise in judicial education. (See Rule 6.50, Cal. Rules of Court.)

6.) Unlike the Legislature, which has "plenary" authority limited by the California Constitution, the Judicial Council only has the authority expressly granted by the constitution. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) The constitution does, however, vest the Judicial Council with express authority to adopt rules for courts and judges. (See, e.g., Cal. Const., art. VI, § 4 [the Chief Justice shall assign judges to the appellate division of the superior courts for specified terms pursuant to rules adopted by the Judicial Council]; art. VI, § 12, subd. (c) [the Judicial Council shall provide, by rules of court, for the time and procedure for transfer and review by the Supreme Court].) In addition, article VI, section 6, subdivision (d) of the California Constitution provides that to "improve the administration of justice" the Judicial Council shall "adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute." Subdivision (d) further specifies that the rules adopted by the Judicial Council "shall not be inconsistent with statute."^{2/}

The language of subdivision (d) -- authorizing the Judicial Council to adopt rules for court administration, practice and procedure -- is quite broad. The question presented to us is whether such broad language encompasses the authority to adopt rules for judicial education. To answer this question, we look to another provision of the constitution for guidance. Article VI, section 23 addresses trial court unification, and subdivision (b) of that section provides: "*Pursuant to Section 6*, the Judicial Council may prescribe appropriate education and training for judges with regard to trial court unification." (Emphasis added.) The highlighted words suggest that the Judicial Council's authority to prescribe appropriate education and training for judges with regard to trial court unification is "pursuant to" the authority vested in the Judicial Council under Article VI, section 6. Although Section 23 pertains to trial court unification, and although Section 23 is scheduled for repeal on January 1, 2007, it nonetheless indicates that Article VI, section 6 vests the Judicial Council with the power to adopt rules for judicial education and training.^{3/}

2. Article VI, section 6, subdivision (f) adds that judges "shall cooperate" with the Judicial Council.

3. We understand that on or about June 15, 2006, the Executive Director of the California Judges Association received a memorandum from the law firm Munger, Tolles & Olson discussing the authority of the Judicial Council to adopt rules for judicial education. One portion of the memorandum addressed article VI, section 23 of the California Constitution. The memorandum acknowledged that Section 23 could be interpreted to confirm that the Judicial Council's authority to prescribe rules for judicial education is derived "pursuant to Section 6." But the memorandum also articulated a "counter-argument" that Section 23 instead expands the Judicial Council's authority for the specific purpose of unification training. The memorandum conceded, however, that the counter-argument would render the "pursuant to" language in Section 23 as "probably unnecessary." Of course, rules of construction require courts to avoid interpretations that would render words unnecessary. "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose."

Article VI, section 6 also vests the Judicial Council with authority to perform "other functions prescribed by statute." The constitutional language is phrased in the conjunctive form: the Judicial Council shall "adopt rules for court administration, practice and procedure, *and* perform other functions prescribed by statute." (Cal. Const., art. VI, § 6, subd. (d); emphasis added.) Thus, it appears that the "other functions prescribed by statute" do not define the scope of the Judicial Council's constitutional authority to adopt rules for court administration, practice and procedure, but instead establish additional duties and responsibilities for the Judicial Council. In any event, the Legislature has also recognized that the Judicial Council is the appropriate entity to adopt rules for the education and training of judges. Government Code section 68088 states: "The Judicial Council may provide by rule of court for racial, ethnic, and gender bias, and sexual harassment training for judges, commissioners, and referees." Moreover, Welfare and Institutions Code section 304.7, subdivision (a), provides in pertinent part that "the Judicial Council shall develop and implement standards for the education and training of all judges" who conduct hearings pursuant to section 300 of the Welfare and Institutions Code (pertaining to the jurisdiction of the juvenile courts). In addition, other statutes recognize that the Judicial Council is the appropriate entity to "establish" or "provide" education and training for judges. (See, e.g., Gov. Code, §§ 68551 [the Judicial Council has authority to "conduct institutes and seminars" for orientation, continuing education, and to promote uniformity in judicial procedure]; 68553 [the Judicial Council "shall establish" judicial training programs for judges, referees, commissioners, mediators and others who perform duties in family law matters]; 68553.5 [the Judicial Council "shall provide" education to judicial officers on mental health and developmental disability issues affecting juveniles in delinquency proceedings]; 68555 [the Judicial Council "shall establish" judicial training programs for judges, referees, commissioners, mediators and others who perform work in domestic violence matters]; Penal Code, §§ 1170.5 [the Judicial Council "shall conduct" annual sentencing institutes for trial court judges]; 13828.1 [the Judicial Council "shall establish and maintain" an ongoing program to provide training for the judicial branch of government relating to child sexual abuse cases].)⁴

The Judicial Council has exercised rule-making authority over judicial education and training for more than a decade. Effective January 1, 1996, the Judicial Council adopted Rule 970 of the California Rules of Court. Rule 970 requires each newly appointed or elected judge to attend a new-judge education program. (Rule 970, subd. (e), Cal. Rules of Court.) The Judicial

(*Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776.) "[A] construction making some words surplusage is to be avoided." (*Ibid.*; Code Civ. Proc., § 1858.) In any event, the memorandum ultimately concluded that "it is more likely than not" that a court would hold that the Judicial Council has authority to adopt rules for judicial education.

4. Welfare and Institutions Code section 264 gives additional statutory responsibility to the Judicial Council. Section 264 states that judges from the juvenile courts shall meet from time to time "[a]t the direction and under the supervision of the Judicial Council" for the purpose of improving the administration of justice in the juvenile courts. (Welf. & Inst. Code, § 264.)

Council also adopted Section 25.1 (formerly Section 25) of the Judicial Administration Standards (set forth in the Appendix to the California Rules of Court). Section 25.1 establishes general judicial education standards. The current Section 25 also became effective in 1999, establishing objectives for judicial education. Sections 25.2, 25.3 and 25.4 establish additional judicial education standards. As far as we know, the Legislature has not enacted any statute limiting Rule 970 or Section 25 *et seq.*, and the provisions have not been invalidated by the courts. As the California Supreme Court recently held, the fact that the Judicial Council has interpreted its rule-making authority in a particular way for years without limitation from the Legislature is an appropriate factor to consider in analyzing Judicial Council rule-making authority. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1012, 1014-1015.)

The foregoing discussion establishes that the constitution expressly authorizes the Judicial Council to adopt rules for courts and judges, including rules for court administration, practice and procedure. The constitution further indicates that this broad constitutional language encompasses the authority to adopt rules for judicial education, i.e., that the authority to adopt rules for judicial education is "pursuant to" article VI, section 6. In addition, the Legislature has recognized the Judicial Council as the appropriate entity to adopt rules for judicial education, and the Judicial Council has been acting with such an understanding for years with apparent acquiescence from the Legislature. Under the circumstances, we conclude that the Judicial Council has authority to adopt rules for judicial education.

Of course, even if the Judicial Council has authority to adopt rules in a particular subject area, those rules would nonetheless be invalid if they are "inconsistent with statute." (Cal. Const., art. VI, § 6, subd. (d).) The Supreme Court has explained, however, that just because a rule goes beyond the scope of a statutory provision does not make it "inconsistent" with statute. (*Butterfield v. Butterfield* (1934) 1 Cal.2d 227, 228.) A rule will be upheld if it is "a reasonable provision in furtherance of the statutory purpose." (*Ibid.*)⁵ In *People v. Mendez* (1999) 19 Cal.4th 1084, the California Supreme Court upheld Rule 31(d) of the California Rules of Court,

5. In the case entitled *In re Robin M.* (1978) 21 Cal.3d 337, the California Supreme Court invalidated a rule that clearly did not further the statutory purpose. That case involved a minor detained in juvenile hall. A detention hearing was held, but when the prosecutor was unable to proceed with a jurisdiction hearing as scheduled, the juvenile court dismissed the petition and ordered the minor released. The prosecutor then filed a second, virtually identical petition and sought to have the minor detained again pursuant to former Rule 1351(e) of the California Rules of Court. The Supreme Court noted that under the Welfare and Institutions Code, the minor was entitled to a jurisdiction hearing within 15 judicial days of his detention hearing. (*Id.*, at p. 346.) The statutory scheme further specified that postponement could occur only under certain limited circumstances. (*Id.* at p. 344.) Moreover, the legislative history expressly identified "excessive and unwarranted detention of children" as a major problem. Based on the foregoing, the Supreme Court held that "[i]nsofar as rule 1351 is inconsistent with this legislative intent, it is disapproved." (*Id.*, at p. 346.)

finding that the Legislature sought to promote judicial economy by enacting Penal Code section 1237.5, and that the Judicial Council evidently had the same purpose in adopting Rule 31(d). The Court said the rule "refined the mechanism that the Legislature established." (*Mendez, supra*, 19 Cal.4th at p. 1098.)^{6/} And the Supreme Court applied a similar standard in a case involving a local rule of court, explaining that in the absence of "legislative direction" to the contrary, courts may adopt local rules with the force of law. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 29.)^{7/}

Last year, the California Supreme Court decided *Sara M. v. Superior Court* (2005) 36 Cal.4th 998. In that case, three children were removed from the mother's custody because of the mother's substance abuse. The juvenile court began reunification services to try to reunite the family, but after six months of such services, the court found that the mother had failed to contact or visit the children. (*Id.*, at p. 1005.) Pursuant to Welfare & Institutions Code section 366.21, subdivision (e), and Rule 1460(f)(1)(B) of the California Rules of Court, the juvenile court terminated reunification services and scheduled a hearing to establish a permanent plan for the children. (*Sara M.*, *supra*, 36 Cal.4th at p. 1005.) The mother sought a writ, arguing, among other things, that Rule 1460(f)(1)(B) is inconsistent with Section 366.21(e).

The Supreme Court acknowledged in *Sara M.* that the statute in question was susceptible

6. The Supreme Court also upheld a rule that codified case law. *People v. Hester* (2000) 22 Cal.4th 290 involved a review of former Rule 412(b) of the California Rules of Court. Penal Code section 654 precludes multiple punishments for a single act or indivisible course of conduct (*Hester, supra*, 22 Cal.4th at p. 294), but former Rule 412(b) stated that by agreeing to a specified prison term, a defendant abandoned any claim that the sentence violated Section 654. (*Hester, supra*, 22 Cal.4th at p. 293.) The Supreme Court held that "[i]n adopting the rule, the Judicial Council merely codified one of the applications of the case law rule that defendants are estopped from complaining of sentences to which they agreed." (*Id.*, at p. 295.)

7. The California Courts of Appeal have generally applied a consistent standard. (See, e.g., *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 363-365, 371 [a rule may go beyond the statute if it reasonably furthers the statutory purpose, but a rule may not deviate from a statutorily prescribed procedure, and in this case the rule is inconsistent with the limits and conditions provided by statute]; *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 33 [rule is inconsistent with Legislative intent determined by review of statutory scheme]; *In re Juan C.* (1993) 20 Cal.App.4th 748, 753 [rule is not inconsistent with law]; *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7, 10-11 [rule was consistent with statute when adopted, but Legislature's subsequent amendment of statute indicated changed intent, and rendered rule inconsistent with statute]; *People v. Reeder* (1984) 152 Cal.App.3d 900, 919 [although the rule is broader than the statute, it is not irreconcilable with the statutory scheme]; *Hitch v. Superior Court* (1934) 2 Cal.App.2d 406, 409 [the rule is not inconsistent with the statute, but is supplementary].)

to more than one interpretation. But the Supreme Court declined to abruptly change the interpretation previously adopted by the Courts of Appeal and the Judicial Council. (*Sara M.*, *supra*, 36 Cal.4th at pp. 1005, 1011.) The Court stated that the Judicial Council approved the rule pursuant to its constitutional and statutory authority to adopt rules for court administration, practice and procedure, not inconsistent with statute. (*Id.*, at p. 1011.) The Court reaffirmed that rules adopted by the Judicial Council have the force of law to the extent they are not inconsistent with legislative enactments and constitutional provisions. (*Ibid.*)

Recognizing that the interpretation of a statute is ultimately a legal question for the courts, the Supreme Court held in *Sara M.* that rules interpreting statutes are entitled to a measure of judicial deference. (*Sara M.*, *supra*, 36 Cal.4th at p. 1014.) The Court said that when a statute is susceptible to more than one interpretation, the Court will consider an administrative interpretation that is reasonably contemporaneous with its adoption. (*Sara M.*, *supra*, 36 Cal.4th at pp. 1011-1012.) "Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless clearly erroneous." (*Id.*, at p. 1012, quoting *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 234.)

The Court noted in *Sara M.* that Rule 1460 was adopted contemporaneously with Section 366.21, and its interpretation has never changed. (*Sara M.*, *supra*, 36 Cal.4th at p. 1014.) It was subjected to public comment and internal review (*ibid.*), and the Judicial Council has standing advisory committees with experts directed to act in the best interests of the public and the entire court system. (*Sara M.*, *supra*, 36 Cal.4th at p. 1013.) The Judicial Council's membership consists of appellate and trial judges, as well as others, which makes it "uniquely situated to implement the legislative policy." (*Ibid.*) The Court held that all of these circumstances supported the conclusion that Rule 1460's interpretation of Section 366.21 was entitled to great weight and would not be overturned unless it was clearly erroneous. (*Ibid.*)⁸

Furthermore, the Supreme Court added that another reason for not overturning Rule 1460 was legislative acquiescence. (*Sara M.*, *supra*, 36 Cal.4th at p. 1014.) The Legislature amended Section 366.21 and other related dependency statutes after the Judicial Council adopted Rule 1460, but the Legislature did not seek to modify the interpretation adopted by the Judicial Council. (*Id.*, at pp. 1014-1015.) In addition, the Supreme Court said that the rule's interpretation was consistent with the purpose of the statutory scheme. (*Id.*, at p. 1015.)

The foregoing California Supreme Court decisions establish that rules are not inconsistent with statute merely because they expand on statutory directives. Absent legislative direction to

8. The Court indicated that judicial review of "quasi-legislative" rules, as opposed to interpretive rules, is very limited. (*Sara M.*, *supra*, 36 Cal.4th at p. 1012.) And the Court suggested that greater deference might be afforded to rules relating to an area that the Judicial Council is "immersed in administering." (*Sara M.*, *supra*, 36 Cal.4th at p. 1014, fn. 5.)

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the contrary, rules adopted by the Judicial Council will be upheld if they are not inconsistent with the legislative purpose. In addition, deference will be afforded to the Judicial Council's expertise and process, and legislative acquiescence is also relevant.

Applying these standards to the proposed rules for judicial education, it is clear that the proposed rules would expand on the education and training previously directed by the Legislature. But nothing in the existing statutory language specifically prohibits the Judicial Council from adopting additional rules for judicial education, and nothing in the statutory language expressly indicates that the Legislature intended to prevent the Judicial Council from exercising its unique expertise to adopt rules for more comprehensive education for judges. (See Gov. Code, § 68088 [Judicial Council may adopt rules for racial, ethnic, gender bias, and sexual harassment training]; Welf. & Inst. Code, § 304.7, subd. (a) [Judicial Council shall develop standards for education of judges who conduct hearings pursuant to section 300].) Instead, the existing statutes evince a legislative purpose and intent to ensure that judicial officers maintain professionalism and competence in the law. The proposed rules are not inconsistent with that purpose.

In addition, the Judicial Council has exercised rule-making authority over judicial education and training for more than a decade. The proposed rules expand on rules for judicial education that have existed for some time (see, e.g., Rule 970, Cal. Rules of Court), with apparent acquiescence from the Legislature. Moreover, the proposed rules have been developed over time in an administrative process involving experts in the field and extensive public review and comment. And the Judicial Council remains "uniquely situated to implement the legislative policy." (*Sara M.*, *supra*, 36 Cal.4th at p. 1013.)

Under the circumstances, we conclude that the proposed rules are not inconsistent with statute.

Sincerely,



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For BILL LOCKYER
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